American University Business Law Review

Volume 7 | Issue 2 Article 4

2018

Fake News and Financial Markets: A 21st Century Twist on Market Manipulation

Bianca Petcu
American University Washington College of Law

FAKE NEWS AND FINANCIAL MARKETS: A 21ST CENTURY TWIST ON MARKET MANIPULATION

BIANCA PETCU*

I. INTRODUCTION

There are a few things that the United States prides itself on: liberty, democracy, and a free market system.[1] Since its inception, the financial

* Junior Staffer, *American University Business Law Review*; J.D. Candidate, American University Washington College of Law, 2019. I would like to thank the entire *American University Business Law Review* staff for their tireless work, guidance, and advice throughout every step in this process. I am also eternally grateful to my mom, dad, sister, and Laro for their unwavering support, even when they do not completely understand what I am working on or what a Comment entails. And lastly to my beautiful generation full of passionate leaders fighting for truth and justice every day, thank you.

1. *See* Bob Cohn, *21 Charts That Explain American Values Today*, ATLANTIC (June

market has defined the United States' position as a global leader.[2] Therefore, balancing issues involving both the First Amendment and the free market system can be complex.[3]

On April 10, 2017, the Securities Exchange Commission ("SEC") filed twenty-seven complaints for fraudulent promotion of stock against stock promotion firms and holding companies.[4] The holding companies paid writers to generate hundreds of optimistic articles about public company clients while concealing from investors that these were paid promotions.[5] Out of the twenty-seven complaints, one company, Lidingo Holdings LLC ("Lidingo Holdings"), has garnered the most publicity.[6]

Beginning in 2010, Lidingo Holdings allegedly disseminated fake or hyperbolic information[7] about stock options to either inflate or denigrate buyers' interest.[8] The SEC mandates that stock promoters disclose their relationship with holding companies.[9] Failure to disclose leads stockholders

---

27, 2012), https://www.theatlantic.com/national/archive/2012/06/21-charts-that-explain-american-values-today/258990/ (stating that freedom of speech and freedom of religion are the top examples of America's values compared to other places in the world).

2. *See* Mark Penn, *Americans Are Losing Confidence in the Nation but Still Believe in Themselves*, ATLANTIC (June 27, 2012), https://www.theatlantic.com/national/archive/2012/06/americans-are-losing-confidence-in-the-nation-but-still-believe-in-themselves/259039/ (showing that two-thirds of Americans believe freedom of speech, the free enterprise system, principles of equality, and our Constitution sets America apart from other countries).

3. *See id.* (articulating support for how the values Americans hold can become complex when pitted against one another).

4. SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709, at *1 (Apr. 12, 2017); *see What We Do,* SEC, https://www.sec.gov/Article/whatwedo.html#create (last updated June 10, 2013) [hereinafter *Creation of the SEC*] (showing that the SEC is the regulatory Agency created to regulate the securities industry).

5. *See Lidingo Holdings*, 2017 WL 2402709, at *1 (clarifying what the holding companies have done to bring about an SEC action).

6. *See* Adam Klasfeld, *In Stock Charges, Fake-News Mill Ran Near Tinseltown*, COURTHOUSE NEWS SERV. (Apr. 11, 2017), https://www.courthousenews.com/stock-charges-fake-news-mill-ran-near-tinseltown/ (directing attention to the fact that a Hollywood actress is a founder of Lidingo Holdings, and therefore, has brought Lidingo the most publicity out of the other twenty-seven complaints). *See generally Lidingo Holdings*, 2017 WL 2402709, at *1-2.

7. *See* Complaint ¶¶ 1, 30, SEC v. Lidingo Holdings, LLC, 1:17-cv-02540, 2017 WL 1321730 (S.D.N.Y. Apr. 10, 2017) (No. 17-2540) (stating that a few examples of investment sites that published stories originating from Lidingo are: SeekingAlpha.com, Benzinga.com, WallStCheatSheet.com, Finance.Yahoo.com, InvestorsHub.com, Investing.com, and Forbes.com).

8. *See id.* ¶ 30 (showing one Lidingo Holdings "author" used multiple pseudonyms to remain anonymous, including A. John Hodge, The Swiss Trader, Amy Baldwin, Trading Maven, Henry Kawabe, Teresa Dawn, and Leopold Epstein).

9. *See* Press Release, SEC, SEC: Payments for Bullish Articles on Stocks Must Be

to believe the source was an independent researcher.[10] This is where the First Amendment intersects with the financial markets.[11]

This Comment will focus on how market manipulation and the First Amendment could affect how the U.S. District Court for the Southern District of New York will decide *SEC* v. *Lidingo Holdings, LLC*[12] "fake news" case.[13] Section II will provide a primer of the history and evolution of market manipulation schemes, describe the SEC and its regulatory powers, look at the historical strength of the First Amendment, and introduce cases that can be used as precedent going forward. Section III will analyze prior cases and apply those rulings to *Lidingo Holdings*, to argue that the SEC should use a similar justification that the Federal Trade Commission ("FTC") uses for disseminating harmful commercial speech. Finally, Section IV will recommend that the court find the speech in *Lidingo Holdings* constitutes commercial speech, and further, that the SEC should implement a whistleblower program to regulate fake news, as well as follow the FTC's enforcement actions when dealing with fake news in the commercial speech context.

II. MARKET MANIPULATION AND FIRST AMENDMENT RAMIFICATIONS

The twenty-seven complaints issued by the SEC on fake news stock promotion shows that market manipulation is ever-present in the financial markets.[14] Some forms of market manipulation predate the creation of a regulatory agency.[15]

Disclosed to Investors (Apr. 10, 2017), https://www.sec.gov/news/press-release/2017-79 (explaining that without disclosure of a relationship stockholders will assume the information is without bias).

10. *See* Complaint, *supra* note 7, ¶ 12 (showing that there was direct communication between the holding company and the scheme, when an email revealed employees within the holding company discussing their "no disclosures policy": "[H]e wants to disclose as he is CFA. No disclosures allowed").

11. *Id.* ¶ 3 (affirming that since writers are involved in the major legal issue there will be an argument made in support of the First Amendment and the freedom to write as one pleases).

12. SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709, at *1 (Apr. 12, 2017).

13. *Id.* (explaining the particular scheme present as one that involves the creation of fabricated articles to create an illusion of a stock that could provide large returns therefore using fake news stories to promote stocks).

14. *See, e.g.*, Complaint, *supra* note 7, ¶ 1 (acknowledging that the type of market manipulation present in this case is an old type of manipulation taking a new form).

15. *See, e.g.*, Andrew Beattie, *The Pioneers of Financial Fraud*, INVESTOPEDIA, http://www.investopedia.com/articles/financial-theory/09/history-of-fraud.asp (last updated Dec. 13, 2017, 3:22 PM) (explaining how market manipulators have plagued the United States since its creation, from Hamilton having to deal with outstanding bonds in

A. The Big Three: Pyramid Schemes, Insider Trading, and Pump-and-Dumps

The first market manipulation scheme was recorded in ancient Greece in 300 B.C.[16] Since then, people have manipulated financial markets in ways that create harmful effects on investors, buyers, and market participants.[17] While the ancient Greeks manipulated their markets by trying to control supply and demand for certain commodities, today's society has transformed market manipulation such that it involves using the media to disseminate false "facts" to alter consumer practices.[18]

In 1918, Charles Ponzi discovered how to manipulate a relatively new financial market through pyramid schemes.[19] Ponzi would use his own existing funds to pay new "investors" and recycle the same money through the pyramid of people while making a percentage of the profits for himself.[20] Though Ponzi was not the first to implement such a scheme, his name remains forever ascribed to all future attempts to manipulate the market in this way.[21]

Like pyramid schemes, insider trading has impacted the market system

---

the newly formed Treasury Department, to Ulysses S. Grant's son falling for a fake investment and losing all the families money).

16. *See* Kaitlyn Kiernan, *From Ancient Greece to Wall Street: A Brief History of the Options Market*, FINRA (May 20, 2015), https://www.finra.org/investors/ancient-greece-wall-street-brief-history-options-market (examining where the first recorded market manipulation schemes began and how early these issues have been penetrating all types of market systems).

17. *See e.g.*, Beattie, *supra* note 15 (showing from pyramid schemes in starting at the beginning of market society, to insider trading starting in 1920s, to pump-and-dump cases increasing in 1980s, market manipulation does not necessarily disappear—it evolves and multiplies).

18. *See* Carmen Germaine, *SEC Signals No Patience for Fake News on Stocks*, LAW360 (Apr. 11, 2017, 9:41 PM), https://www.law360.com/articles/912501/sec-signals-no-patience-for-fake-news-on-stocks (upholding the SEC's decision to act on these twenty-seven complaints and explaining how fake news links them).

19. *See* Alex Altman, *A Brief History of Ponzi Schemes*, TIME (Dec. 15, 2008), http://content.time.com/time/business/article/0,8599,1866680,00.html (describing how Ponzi made a simple promise to his investors; he would make them rich while they made others rich and the cycle would continue); *Fast Answers: Ponzi Schemes*, SEC, https://www.sec.gov/fast-answers/answersponzihtm.html (last modified Oct. 9, 2013) (noting that the SEC defines pyramid schemes as "the payment of purported returns to existing investors from funds contributed by new investors").

20. *See* Altman, *supra* note 19 (explaining the history of Ponzi's 'stamp scheme' and how it was the standard that future pyramid schemes followed).

21. *See generally* Kiernan, *supra* note 16 (showing how even a century after Ponzi effectuated his last scheme people continue to use his name, most recently seen with Bernie Madoff and his Ponzi scheme).

since the beginning of corporate America.[22] The increased usage of insider trading led the Federal Government and Congress to create a regulatory agency to oversee the securities market.[23] The SEC defines insider trading as "buying or selling a security . . . while in possession of material, nonpublic information."[24]

New forms of market manipulation continued to emerge after 1920.[25] Pump-and-dump schemes became extremely popular in the 1980s and 1990s following the advent of the Internet and the prevalence of personal telephones in the United States.[26] The SEC defines a pump-and-dump scheme as "the touting of a company's stock through false and misleading statements to the marketplace."[27] Pump-and-dump schemes do not require extensive financial skill to succeed.[28] For a pump-and-dump scheme to achieve its desired goal, an investor, or market participant, must be easily deceived and made to believe that the penny stock the broker is pushing them to buy in bulk will simply produce large returns.[29]

---

22. *See, e.g.*, Strong v. Repide, 213 U.S. 419, 431 (1909) (showing the first insider trading case to be prosecuted was decided in 1909, during the rise of the financial market and industrial revolution).

23. *See Fast Answers: Insider Trading*, SEC, https://www.sec.gov/fast-answers/answersinsiderhtm.html (last modified Jan. 15, 2013) [hereinafter *Insider Trading*] (listing who the SEC needs to look out for, and who regularly commits insider trading schemes); *see also Creation of the SEC*, *supra* note 4 (explaining the ruling in the first insider trading case in 1909, *Strong v. Reptide*, is clear: executives could not use privileged information for profit).

24. *See Insider Trading*, *supra* note 23 (explaining that using nonpublic material information to buy and sell stocks creates an uneven advantage to manipulate the market leaving others not privy to the information on an unequal playing field).

25. *See* Kiernan, *supra* note 16 (showing a timeline of how market manipulation schemes progressed through history).

26. *Simple Scam, Long History*, WALL ST. J. GRAPHICS, http://graphics.wsj.com/embeddable-carousel/?slug=pump-and-dump-history (last visited Jan. 18, 2018) (using a Powerpoint presentation).

27. *Fast Answers: "Pump-and-Dumps" and Market Manipulations*, SEC, https://www.sec.gov/fast-answers/answerspumpdumphtm.html (last modified June 25, 2013) [hereinafter *Pump-and-Dumps*] (highlighting that these schemes start from typically small, so-called "microcap" companies).

28. *See generally* SEC v. Stratton Oakmont, Inc., 878 F. Supp. 250, 251-57 (D.D.C. 1995) (explaining how Belfort created a company specifically to push penny-stocks, before the FBI arrested him and shut down the company); Michael Lewis, *Jonathan Lebed's Extracurricular Activities*, N.Y. TIMES (Feb. 25, 2001), http://www.nytimes.com/2001/02/25/magazine/jonathan-lebed-s-extracurricular-activities.html (showing how a fifteen-year-old could pull off a successful pump-and-dump scheme).

29. *See Pump-and-Dumps*, *supra* note 27 (introducing the "penny stock" which is a stock that is so low in price that anyone can buy it in bulk, hopefully buying enough that when the stock price rises, the stockholder will make high returns).

B. The Creation of Regulation

Due to the increase in market manipulation and the adverse effects of the Great Depression on financial markets, Congress passed the Securities Act of 1933 ("'33 Act") and the Securities Exchange Act ("'34 Act") of 1934.[30] In so doing, Congress enabled the SEC to bring enforcement actions against companies and individuals that manipulate the securities market; however, the types of manipulations subject to SEC enforcement action were left open-ended.[31]

The '33 Act and the '34 Act are used in conjunction with most market manipulation cases because of the similarities that section 17(a) from the '33 Act shares with Rule 10b-5[32] in the '34 Act.[33] In 1942, the newly codified Rule 10b-5 of the '34 Act was expanded to make the fraud provisions applicable to purchases and to the sale of securities.[34] By expanding said provisions, the SEC broadened its jurisdiction over market manipulation; however, the '34 Act still lacked a clear definition of an "insider trader."[35]

---

30. *See* 15 U.S.C. § 77b(b) (2012) (ensuring that the Commission will consider disclosures to the public on the interstate sale of securities, so that potential investor may make fully informed buying decisions); *see also* 15 U.S.C. § 78a (2012) (governing the rules for agents, broker dealers and securities that trade in the stock market and determining the laws that regulate the exchanges and their participating broker-dealers).

31. *See Creation of the SEC*, *supra* note 4 (showing that the SEC understood that there would be market manipulation schemes that would evolve and multiply as the financial market manipulators became savvier so therefore having a non-exhaustive list would allow the SEC to cover schemes they could not have imagined when it was first created).

32. *See* 17 C.F.R. § 240.10b-5 (2018) (codifying Rule 10b-5—though both are still used and listed together in complaints—and clarifying that the SEC has specific statutes that were enacted to prevent brokers from using manipulative and deceptive devices and to protect market participants from defrauding schemes).

33. *See* 15 U.S.C. § 77q(a)(2) (stating that it is illegal for any person in the offer or sale of securities to receive money by making an untrue statement of a material fact or omitting to state a material fact); *see also* 17 C.F.R. § 240.10b-5(b) (stating that direct or indirect deceit, fraud, and omission of material facts are unlawful). *See generally* Brook Dooley et al., *Antifraud: Section 17(a) of the Securities Act of 1933: Unanswered Questions*, KEKER VAN NEST & PETERS LLP (July 8, 2013), https://www.keker.com/Templates/media/files/Articles/Section17a_2013.pdf (outlining the difference between section 17a and section 240.10b-5 yet showing how they are both often used together in prosecution).

34. *See* 17 C.F.R. § 240.10b-5 (outlining section 240.10b-5 and Rule 10b-5 as the key provisions to prosecute securities fraud, although neither defines insider trading, and stating that the rule is enforced against any person who defrauds another in the purchase or sale of a security).

35. *See Timeline: A History of Insider Trading,* N.Y. TIMES (Dec. 6, 2016), https://www.nytimes.com/interactive/2016/12/06/business/dealbook/insider-trading-timeline.html?mcubz=1&_r=0 [hereinafter *History of Insider Trading*] (showing that when the '34 Act was passed the term "insider trading" was not used; then when the term was eventually added to the statute it was not defined, leaving the courts to set a definition

Together, section 17(a), section 240.10b-5, and Rule 10b-5 are used in enforcement actions against the fraudulent sales of securities.[36] To better understand how something can be categorized as "false or misleading," courts closely analyze section 240.10b-5 of the '34 Act for its statutory meaning and interpretation.[37] There are a few words that courts focus on or dissect when deciding market manipulation cases. The courts deciding these market manipulation cases have historically analyzed the following terms: "directly or indirectly," "to make an untrue statement," "course of business would operate as a fraud," "in connection with the sale of any security" to adequately assess the cases before them.[38]

Additionally, section 240.10b-5, and Rule 10b-5, require scienter by the party enacting the fraud; otherwise known as an intent to deceive.[39] This requirement often makes it more difficult to prove actual intentional fraudulent market manipulation schemes.[40] Without the intent requirement,

---

through precedent).

36. 15 U.S.C. § 77q(a)(2); *see* 17 C.F.R. 240.10b-5. *See generally Frequently Asked Questions About Rule 10b5-1 Plans*, MORRISON FOERSTER, http://media.mofo.com/files/uploads/Images/FAQ10b51.pdf (last visited Jan. 19, 2018) (clarifying that Rule 10b-5 was codified as section 240.10b-5 in the '34 Act, but Rule 10b-5 is still used in tandem with section 240.10b-5 because of a disparity in interpretation by circuit courts after a United States Supreme Court decision).

37. *See* 17 § C.F.R. 240.10b-5 (stating that it is illegal to use any device or scheme to defraud; to make untrue statements of a material fact or to omit a material fact; or to engage in any act, practice, course of business which operates as a fraud or deceit upon any person, about the purchase or sale of any security).

38. *See id.* (articulating that these phrases are broad enough for a more open interpretation; courts deciding cases based on section 240.10b-5 will focus on these phrases and the facts of each individual case sometimes in drastically different ways than courts before them); *see also History of Insider Trading*, *supra* note 35 (detailing when in the timeline of insider trading cases the Supreme Court began focusing on specific words within the statutes).

39. *See* 17 C.F.R. § 240.10b-5; *see also* 15 U.S.C. § 77q(a) (defining scienter as having the intent or knowledge of wrongdoing, and further, requiring publishers to disclose who paid them, the amount, and the type information about publicly traded securities for compensation).

40. *See* 15 U.S.C § 77q(b) (supporting why the SEC has turned to including section 17(b) and section 17(a) of the '33 Act in its complaints as protection, section 17(b) does not require intent and is therefore easier to prosecute); *see also* Donald C. Langevoort, *Reflections on Scienter (and the Securities Fraud Case Against Martha Stewart That Never Happened)*, 10 LEWIS & CLARK L. REV. 1, 3, 5 (2006) (arguing that the requirement to meet scienter for Rule 10b-5 and Section 240.10b-5 is difficult for courts to consistently decided on); Peter J. Henning, *The Difficulty of Proving Financial Crimes*, N.Y. TIMES (Dec. 13, 2010, 2:01 PM), https://dealbook.nytimes.com/2010/12/13/the-difficulty-of-proving-financial-crimes/ (showing that the line between being aggressive or being fraudulent is a thin one that involves the application of unclear rules on intent that courts have a hard time accepting).

fraudulent practices could be easier to prosecute.[41] Collectively, Rule 10b-5, section 240.10b-5, and section 17(a)-(b), focus on the underlying principle of stopping the spread of misleading and fraudulent information within the financial markets.[42]

C. Crossroad Cases: When Free Speech Meets the Financial Markets at an Intersection

Carpenter v. United States[43] proved to be the first case connecting the press and a highly public piece of writing to market manipulation.[44] In 1987, *Wall Street Journal* reporter, R. Foster Winans, was convicted for insider trading, specifically for using advance knowledge of articles about publicly traded stocks to collect illegal profits.[45] The United States Supreme Court ruled that although the victim of the fraud was not a market participant, there need only be a mere fraud "in connection with" the purchase or sale of securities.[46] Thus, the expansion and ambiguity of Rule 10b-5 and section 240.10b-5 subjected journalists to the SEC's jurisdiction and potential conviction for market manipulation.[47] The Court reasoned that Winans' deceit and fraud outweighed any First Amendment argument, thereby preventing it from being presented as a legal issue in the case.[48]

Courts have also ruled on pump-and-dump cases that contain First Amendment challenges.[49] The U.S. Court of Appeals for the Second Circuit,

---

41. *See* Henning, *supra* note 40 (supporting the theory that if a prosecutor does not need to find intent, then the market manipulation itself is proof enough).

42. *See* Dooley et al., *supra* note 33 (explaining that the focus within the statutes is on fraud and misleading information).

43. Carpenter v. United States, 484 U.S. 19, 24 (1987).

44. *Id.*

45. *See id.* at 24 (explaining that this use of advance knowledge falls within the definition of fraudulent insider trading).

46. *See id.* at 26 (showing that the victims here are readers and they may not personally be affected by the insider trading happening here, but finding that connection is not necessary).

47. *See id.* at 24 (holding that journalists, separated from the main company still fall under the jurisdiction of the SEC if their actions as journalists affect the market and are "in connection with" the sale of security).

48. *See generally id.* (showing no complete mention of a First Amendment analysis generally throughout the entire opinion even though Winans was writing this information in the opinion section of the *Wall Street Journal*, and attempted to make the defense that it was his First Amendment right to publish his opinions); *Simple Scam, Long History*, *supra* note 26 (providing examples of pump-and-dump schemes).

49. *See* United States v. Downing, 297 F.3d 52, 55 (2d Cir. 2002) (holding that the defendants conspired to create a pump-and-dump scheme that involved fraudulent off-shore companies, unqualified audit reports and false financial statements to deceive potential investors into trusting their business).

in *United States v. Downing*,[50] defined a pump-and-dump scheme as a stock market manipulation tactic where schemers artificially inflate the price of a stock by selling large numbers of penny stocks and then "dumping" the stock when the price increases.[51] The court held that the government was not required to establish the defendant's knowledge of the scheme's details, but rather that it was sufficient that he solely understood its nature.[52] The increase in pump-and-dump cases has compelled courts to expand the definitions of fraud provided in Rule 10b-5 and section 240.10b-5.[53]

This expansion, however, has not reduced the volume of market manipulation schemes in the twenty-first century.[54] *United States v. Gordon*[55] also illustrates a pump-and-dump case involving advertising campaigns to promote "penny stocks" that would inevitably produce little to no returns.[56] The use of an advertising campaign signaled to both the SEC and the legal community that speech, or more precisely different types of speech involved in each case, can, and should be litigated.[57]

Since the 2016 election, "fake news" stories have appeared more frequently throughout society.[58] The more the stories spread, the harder they become to control.[59] False statements, however, are protected speech under

---

50. *Id.*

51. *Id.*

52. *See id.* at 57; *see also* Lewis, *supra* note 28 (stating that "all it takes" to run a successful pump-and-dump scheme is a good sales man with the yellow pages and some financial market knowledge); *Simple Scam, Long History*, *supra* note 26 (showing by examples how it has historically been accepted by courts that defendants understand the nature of the scheme and not necessarily all of the details involved).

53. *See* Jay V. Prabhu, *Criminalizing from the Bench: The Expansion of Section 10(b) in* United States v. O'Hagan, FEDERALIST SOC'Y (May 1, 1998), https://www.fed-soc.org/publications/detail/criminalizing-from-the-bench-the-expansion-of-section-10b-in-united-states-v-ohagan (stating that after *United States v. O'Hagan* the Court criminalized conduct that was never explicitly made a crime by the federal securities statutes and accepted much of the government's misappropriation theory of liability).

54. *See generally* United States v. Gordon, 710 F.3d 1128-1129 (10th Cir. 2013) (showing that even in 2013, more than 100 years after the first recorded case of market manipulation, schemes continue to penetrate the financial market).

55. *Id.*

56. *Id.* at 1128, 1142.

57. *See id.* at 1141 (describing how it is unlawful to publicize a stock that contains material omissions without disclosing the fact and amount of the payment each writer has been given to advertise the stock in this way).

58. *See* Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election* 12 (Nat'l Bureau of Econ. Research, Working Paper No. 23089, 2017) (explaining how social media made the dissemination of fake information easier during the 2016 election with 62% of U.S. adults getting their news from Facebook or social media).

59. *See id.* at 2 (stating that content can be spread among social media users with no

the First Amendment.[60] The Supreme Court acknowledged this recently in *United States v. Alvarez*,[61] which questioned the constitutionality of the Stolen Valor Act.[62] This claim falls under the "false statement" category of First Amendment law.[63] The Stolen Valor Act criminalizes falsely claiming receipt of military honors or medals—in *Alvarez* at a local board meeting, the defendant did just that.[64] The Court ruled that the Stolen Valor Act was unconstitutional and determined that "general false statements" are not unconstitutional and should be protected by the First Amendment.[65]

Like the SEC, the FTC also brings many actions against companies that post false advertisements and mislead consumers, as well as clients.[66] In *FTC v. LeadClick Media, LLC*,[67] the Second Circuit upheld a recent FTC enforcement action involving false and deceptive advertising practices where commercial speech was used to deceive consumers.[68] In *LeadClick Media*, similar to the alleged scheme in *Lidingo Holdings*, the "main company" knew that some or most of the information being posted on its site, whether through advertisements or an advisory article, was false and misleading.[69]

The now ever-present "fake news" schemes utilize technology to quickly disseminate information and spread it across the public market, negatively

---

significant third-party filtering, fact-checking, or editorial judgment).

60. *See* United States v. Alvarez, 567 U.S. 713, 716 (2012) (overturning a statute passed by Congress that said making false statements about military service was illegal; the Supreme Court did not find false information like this to be illegal).

61. *Id.* at 716.

62. *See id.* at 714 (explaining that the Stolen Valor Act was passed to protect the credibility of those who served; making it illegal to claim Medal of Honor status if someone did not receive a Medal of Honor).

63. *Id.* at 715.

64. *Id.* at 713 (describing how at a local water board meeting Alvarez introduced himself as a board member and included a false portion about all of the medals he had won while in the military).

65. *Id.* at 730.

66. *See Truth in Advertising*, FTC, https://www.ftc.gov/news-events/media-resources/truth-advertising (last visited Feb. 7, 2018) (showing that it is the job of the FTC to enforce laws against commercial speech that is harmful to society).

67. 838 F.3d 158, 162 (2d. Cir. 2016).

68. *Id.*

69. *See id.* at 164 ("LeadClick employees also affirmatively approved of the use of fake news sites: one LeadClick employee told an affiliate interested in marketing LeanSpa offers that 'News Style landers are totally fine' followed by two punctuation marks commonly united to represent a smiley face."); *see also* SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709, at *1 (Apr. 12, 2017) (acknowledging that the authors writing the fake news stories were told to withhold their names and that they were being paid to write these stories).

affecting the transparency and efficiency of financial markets for the foreseeable future.[70]

D. The Divisive Role of the First Amendment in Market Manipulation Schemes: A Guide on Dealing with "Fake News"

The phenomenon of "fake news" may seem new and relevant, but false or fake dissemination of information is not new to the financial markets.[71] False and misleading statements have often played a role in market manipulation cases.[72] However, "fake news" market manipulation has taken a new twist.

Previously, when faced with cases involving falsified or exaggerated information disseminated purposefully to affect the buying and selling of stocks, the SEC and the courts mostly avoided deciding on the First Amendment issues present.[73] The increase of fake news cases, including *Lidingo Holdings,* may change the legal approach.[74]

The Investment Advisors Act of 1940 is also at the crux of most "falsified advisory information" cases.[75] Section 80b-2 of the Act defines what it means to be an investment advisor—the definition that courts have historically relied on when making decisions on whether information provided by a person, whether it be through a newspaper or online posting, will be deemed investment advice or a personal opinion.[76]

---

70. *See* Complaint, *supra* note 7, ¶¶ 26, 30 (explaining that the fact that the Internet was used to further the spread of the falsified advisory scheme helped expand the scope of the manipulation).

71. *See, e.g.*, James Carson, *What Is Fake News? Its Origins and How It Grew in 2016*, TELEGRAPH (Mar. 16, 2017, 1:57 PM), http://www.telegraph.co.uk/technology/0/fake-news-origins-grew-2016/amp/ (showing that the 2016 presidential campaign pushed fake news to become a focal point in decision making); *see also* Kenneth Rapoza, *Can 'Fake News' Impact the Stock Market?*, FIN. TIMES (Feb. 26, 2017, 9:05 AM), https://www.forbes.com/sites/kenrapoza/2017/02/26/can-fake-news-impact-the-stock-market/#15b8f142fac0 ("Fake news in the financial market has been a problem for a long time, we just didn't call it fake news.").

72. *See generally Pump-and-Dumps, supra* note 27 (showing how lying and using misleading statements to promote stockholders to buy penny stocks in bulk will produce high returns).

73. *See e.g.*, Carpenter v. United States, 484 U.S. 19, 24 (1987) (avoiding any discussion on potential First Amendment issues even though the defense focused on how the defendant was merely writing an opinion piece for a newspaper).

74. *See e.g.*, Cara Mannion, *SEC Says Stock Promoter Should Face 'Fake News' Suit*, LAW360 (July 25, 2017, 6:05 PM), https://www.law360.com/articles/947798/sec-says-stock-promoter-should-face-fake-news-suit (showing how the Lidingo scheme is fundamentally different than any other scheme the courts have resolved before, thereby putting the court in a possible position to make a First Amendment argument).

75. *See* 15 U.S.C. § 80b-2 (2012).

76. *Id.* (defining an investment advisor as "any person who, for compensation, engages in the business of advising others, either directly or through publications or

In *Lowe v. SEC*,[77] the Supreme Court reversed a Second Circuit decision and allowed a previously convicted investment advisor to post investment advice in a non-bona fide newspaper.[78] Regulating the First Amendment in this way, and barring this investment advisor from continuing to write articles, made the Court uncomfortable.[79] The Court reasoned that the SEC's ability to regulate who can (1) give investment advice and (2) register as an investment advisor walks a thin line with the First Amendment.[80] According to the Court, the definition of "investment advisor" must be met before the SEC has jurisdiction to take away First Amendment privileges.[81]

When *Lowe* was decided in 1985, investment advisors had just begun using the Internet and phones to expose market information to a mass group of people.[82] Specifically, more people could write columns while hiding behind their computers, creating an easier haven for market manipulation.[83] The Court hindered the SEC's ability to regulate these faux-advisors by requiring the SEC to define more clearly parts of the '34 Act before restricting First Amendment rights.[84]

More recently in *SEC v. Agora, Inc.*,[85] the defense counsel made the same

---

writings, as to the value of securities").

77. 472 U.S. 181 (1985).

78. *Id.* at 211 (holding that by the SEC revoking the investment advisor's registration, that this revocation would be considered regulating the First Amendment, and therefore, unconstitutional).

79. *See id.* at 189-91 (showing that instead of ignoring First Amendment arguments the Court would hold the newspaper's writing to a high standard and not allow an independent regulatory agency to restrict its speech).

80. *See* 15 U.S.C. § 80b-2 (stating within the statute who the law applies to); *Regulation of Investment Advisers* 3 (Mar. 2013), https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf [hereinafter *Investment Advisers*] (listing the types of investment advisors that must register with the SEC and showing the limits on advisement, not considering whether the advisement is done via speech within a newspaper or another type of protected speech).

81. *Lowe*, 472 U.S. at 211.

82. *See id.*; *Roundtable on Investment Adviser Regulatory Issues Technology and Investment Adviser Regulation*, INV. COMPANY INST. (May 23, 2000), https://www.ici.org/pubs/white_papers/00_sec_inv_ad_rdtbl_rpt [hereinafter *Roundtable on Investment Advisors*] (explaining the effect the Internet on investment advisors in the 1980s through the early 2000s while more Americans were given access to information at a quicker pace).

83. *See Roundtable on Investment Advisors, supra* note 82 (establishing that technology is changing how investment advisors are viewed and who falls under the definition because of blogs and online columns).

84. *See generally Lowe*, 472 U.S. at 211 (stating that the SEC did not meet the burden described in the Investment Advisory Act to prove that the defendant did in fact meet the definition and, therefore, fall under the law).

85. No. MJG-03-1042 (D. Md. Aug. 3, 2007).

First Amendment claims that the Court identified in *Lowe*.[86] This combination of free expression and market analysis has gone hand-in-hand for a while, but Agora, Inc. ("Agora") attempted to strike down the SEC's effort to overreach into regulating speech and publication by using the Court's analysis in *Lowe*.[87] *Agora* was adjudicated during the rise of mass Internet usage,[88] and the false information in question was disseminated via Internet newsletters, published by Agora itself, or an Agora-owned subsidiary.[89]

Agora highlights the concerns of non-disclosure of origin, dissemination of insider information, and the spreading of falsified information that affects market-making decisions.[90] In the Memorandum of Decision, the judge enjoined the defendants from writing similar investment advisor newsletters.[91] He also decided, unlike the Court in *Lowe*, that the speech used in *Agora* was commercial speech and, therefore, did not warrant a long First Amendment debate.[92]

Political speech, editorial speech, and opinion speech are protected when utilized in newspapers or on Internet sites, but commercial speech or false and misleading speech insinuating fraud is not as clear.[93] The SEC usually has the authority to bring enforcement actions against fraudulent speech without infringing on any First Amendment rights.[94]

---

86. *See id.* pt. I, ¶ A (responding, presumably, to the defendant's First Amendment argument: "There is no doubt that each of the Defendants was engaged in the production and distribution of publications entitled to substantial First Amendment protection.").

87. Motion to Dismiss at 8-9, SEC v. Agora, Inc., No. MJG-03-1042, 2017 WL 23325429 (D. Md. June 23, 2003).

88. *See id.* (noting that the Internet and the spread of online blogs and columns added to this issue in *Agora*).

89. Complaint ¶ 1, SEC v. Agora, Inc., No. MJG-03-1042, 2003 WL 22331384 (D. Md. Apr. 9, 2003).

90. *Id.* ¶¶ 15-18; *see also* 15 U.S.C. § 77a (2012) (showing how section 17(b) is used for prosecuting non-disclosure; defining a "non-disclosure of origin" as failing to alert investors on where the information you are making your advisory claims on is coming from).

91. SEC v. Agora, Inc., No. MJG-03-1042 (D. Md. Oct. 3, 2007) (order granting preliminary injunction).

92. *See* Memorandum of Decision at 2, SEC v. Agora, Inc., No. MJG-03-1042, pt. II, ¶ B (D. Md. Aug. 3, 2007) ("The instant case involves commercial speech. . . . commercial speech [is] afforded lesser protection than other forms of expression.").

93. *See* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1169 (2012) (explaining that commercial speech is tied to the public good and economic incentives, therefore giving the government a stronger argument to limit that type of speech versus pure opinion speech that does not affect the public good).

94. *See generally* Roberta S. Karmel, Comm'r, SEC, Remarks to American Friends of the Hebrew University Greater New York Lawyers Division (Sept. 14, 1979) (describing, in her speech, how the First Amendment will only continue to penetrate the

In April of 2017, the SEC filed twenty-seven complaints against holding companies that were hiring writers to disseminate aggressive and fake information about their stocks.[95] The writers did not disclose, per the demands of the holding companies that the holding companies were paying them to publish this information on investment advisory websites.[96] Out of the twenty-seven complaints, the complaint against Lidingo Holdings garnered the most media attention.[97] The decisions made in *Agora* and *Alvarez* will play a significant role in how the court ultimately decides *Lidingo Holdings*.[98] The court will have to look to the type of speech utilized and determine if that speech fits within the interpretation of Rule 10b-5, section 240.10b-5, and section 17(b)'s definitions of "false and misleading" as applied in *Agora* or if it is simply "false statements," as the Court found in *Alvarez*.[99]

III. FAKE NEWS LEAKING INTO THE FINANCIAL MARKETS

When ultimately deciding *Lidingo Holdings*, the court will have to understand previous forms of market manipulation, recognize how these forms of manipulation have evolved, and analyze the decisions made in said cases to determine whether the fact pattern here follows the precedent set by the Supreme Court in *Lowe* or the *Agora* court.[100] The type of fake news market manipulation found in *Lidingo Holdings* is new and the intersection between speech and the financial market will be the crux of the court's decision.[101]

A. Market Manipulation Taking on New Forms in the Modern Era

The market manipulation in *Lidingo Holdings* closely resembles previous

---

SEC's jurisdiction).

95. *See* Germaine, *supra* note 18 (explaining the "whopping" twenty-seven complaints the SEC filed against holding companies).

96. *Id.* (stating that the owner had once stated for an author to "NOT post a disclosure again").

97. *See* Klasfeld, *supra* note 6 (showing that since one of the owners of Lidingo Holdings was a former actress her fame has brought fame to the case).

98. United States v. Alvarez, 567 U.S. 709, 729-30 (2012); SEC v. Agora, Inc., No. MJG-03-1042 (D. Md. June 23, 2003).

99. *Alvarez*, 567 U.S. at 718, 729; *Agora*, No. MJG 03-1042, at 38-39 (explaining that the Defendants' fraudulent conduct does not warrant First Amendment protection).

100. *See* Lowe v. SEC, 472 U.S. 181, 211 (1985) (demonstrating that an investment advisor may not be liable for the words disseminated about a stock); *Agora,* No. MJG-03-1042 (demonstrating that an investment advisor may be liable for fraudulent conduct related to stock); *see also* SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709, at *1-2 (Apr. 12, 2017).

101. *Lidingo Holdings*, Litigation Release No. 23802, 2017 WL 2402709, at *1.

insider trading and pump-and-dump schemes.[102] In deciding *Carpenter*, an insider trading case, the Court looked to four factors under Rule 10b5 and section 240.10b-5: (1) whether the conspiracy fell within interstate commerce, mail, or wire fraud; (2) whether the *Wall Street Journal* had a property right interest in keeping their information confidential prior to publication; (3) whether the defendant's activities constituted a scheme to defraud; and (4) whether the use of wires and mail was sufficient to satisfy the requirement that mail be used to execute scheme.[103] The Court also found that the defendant's requisite scienter had been proven, which can be notoriously difficult to demonstrate in market manipulation cases.[104]

With the first factor, the *Carpenter* Court's focus on mail fraud within section 10(b) enabled it to disregard the First Amendment issues.[105] The court deciding *Lidingo Holdings* will not have the same luxury since the defendants are likely going to make First Amendment arguments as a defense.[106] While the *Wall Street Journal* was not liable for the fraudulent decisions made by its financial news reporter, Winans was held personally liable.[107] Like *Carpenter*, the *Lidingo Holdings* court will not hold the investment advisory websites liable for the scheme.[108] Per the complaint, the liability remains with the holding companies and the personal writers who acted in tandem to defraud the public with this scheme.[109]

The court deciding *Lidingo Holdings* will recognize a few similarities between its case and *Carpenter*. The first and fourth factors from *Carpenter*

---

102. *See* United States v. Gordon, 710 F.3d 1124, 1128 (10th Cir. 2013) (stating that this pump-and-dump scheme which used artificially inflated stock values and then selling them to investors for a substantial profit); *see also* United States v. Downing, 297 F.3d 52, 55 (2d Cir. 2002) (explaining that the schemers here artificially inflated the price of a stock and bribed stock promoters to sell it, and then dumped the stock when the price was sufficiently high).

103. 484 U.S. 19, 24-28 (1987).

104. *Id.* at 27-28; *see* Langevoort, *supra* note 40 at 2-3 (explaining that most market manipulation cases add section 17(b) to their complaint because finding scienter under section 240.10b-5 can be very difficult).

105. *See Carpenter*, 484 U.S. at 23 (contending since there was scienter, and a manipulation "in connection with" the sale of securities over interstate commerce, a First Amendment lens was not necessary).

106. *See* Plaintiff's Memorandum in Opposition to Def's. Motion to Dismiss at 13, SEC v. Lidingo, Case No. 17-2540 (S.D.N.Y 2017) (showing that one of the arguments made by defense counsel on behalf of Lidingo, that the plaintiff is negating. is that the articles being posted are merely speech made by a subsidiary and therefore protected).

107. *Carpenter*, 484 U.S. at 28.

108. *See generally* SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709 (Apr. 12, 2017) (showing a similar fact pattern to the one in *Carpenter*).

109. *See* Complaint, *supra* note 7, ¶ 12.

are met in *Lidingo Holdings* because the alleged scheme was carried out on the Internet and, therefore, through interstate commerce.[110] *Lidingo Holdings* involves the use of the Internet in interstate commerce, rather than mail fraud, but is still subject to the same statute.[111] Unlike *Carpenter*, *Lidingo Holdings* has a stronger First Amendment argument since the writers were specifically hired by the holding company to disseminate the falsified information.[112] The court will thus have to consider how any First Amendment issue will strengthen or weaken the ultimate decision of market manipulation.[113]

Carpenter is similar to *Lidingo Holdings* in another specific sense: Lidingo Holdings, like the *Wall Street Journal*, promotes itself as a financial advisory website.[114] So the second and third factors decided in *Carpenter* will differ in *Lidingo Holdings*.[115] Although the holding company argues that its role was analogous to the *Wall Street Journal*, the holding company allegedly paid writers to post hundreds of articles about public companies on financial websites.[116] Therefore, the holding company directly involved itself within the scheme; knowing that if they did not disclose the relationship between the holding company and the investment advisors the stockholders would not feel that the information was biased.[117] In *Carpenter*, the *Wall Street Journal*, merely hired a writer who created his own scheme to defraud stockholders under the *Wall Street Journal's* name.[118] Pursuant to

110. 17 C.F.R. § 240.10b-5 (2018); *see* Complaint, *supra* note 7, ¶ 2; *see also* United States v. Kieffer, 681 F.3d 1143, 1145 (10th Cir. 2012) (holding that by scheming over the Internet the defendant violated interstate commerce and, therefore, using the Internet falls under the commerce clause).

111. 17 C.F.R. § 240.10b-5 (showing Rule 10b-5 was codified into this statute and it mentions fraud within interstate commerce, the interstate commerce here is the use of the Internet).

112. *See* Complaint, *supra* note 7, ¶ 12 (showing that there was direct communication between the holding company and the scheme: "[H]e wants to disclose as he is CFA. No disclosures allowed").

113. *See* Lowe v. SEC, 472 U.S. 181, 211 (1985); SEC v. Agora, Inc., No. MJG-03-1042 (D. Md. Oct. 3, 2007).

114. Complaint, *supra* note 7, ¶ 2; *see also* Jonathan Stempel, *SEC Targets Fake Stock News on Financial Websites*, REUTERS (Apr. 10, 2017, 4:35 PM), http://www.reuters.com/article/sec-fakenews-idUSL1N1HI1IM (showing how Lidingo Holdings considered themselves advisors with "independent, unbiased information").

115. Carpenter v. United States, 484 U.S. 19, 27 (1987); SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709 (Apr. 12, 2017).

116. Complaint, *supra* note 7, ¶ 12.

117. *See id.* ¶ 14 (admitting that the company was specifically telling writers to hide who was paying them and their identities when writing for Lidingo Holdings so that they could push false information to make more people buy their own stocks).

118. *Carpenter*, 484 U.S. at 23.

Carpenter, individual journalists can be held liable for false dissemination of information and fraud.[119] In *Lidingo Holdings*, however, the SEC is charging the holding companies and the individual bloggers as the manipulators.[120] Thus, despite the different roles played by the *Wall Street Journal* in *Carpenter* and Lidingo Holdings in *Lidingo Holdings*, it is foreseeable that the court can decide the case using the analysis of the four *Carpenter* factors.[121]

The SEC's allegations in *Lidingo Holdings* also closely resemble a pump-and-dump scheme involving deceit of investors and misleading information.[122] However, the case contains issues with the First Amendment that have not been previously litigated by the SEC in pump-and-dump cases.[123]

In *Downing*, the Second Circuit held that the defendants' knowledge of the essential nature of the scheme was sufficient to support fraud convictions.[124] The *Downing* court's focus on the knowledge of the "essential nature" of the scheme could be a key factor in deciding *Lidingo Holdings*.[125] Per Rule 10b-5 and section 240.10b-5, the court will need to find the knowledge requisite within the scheme to defraud stockholders.[126]

By using the *Downing* decision, which allowed knowledge of the "essential nature" of the scheme to be sufficient rather than intent, the SEC in *Lidingo Holdings* would have a lower bar to prove the defendant's fraud.[127] In *Lidingo Holdings*, the knowledge of the scheme was evident through emails sent between the holding companies and the writers they

---

119. *Id.*

120. *See* Complaint, *supra* note 7, ¶ 3 (noting that the sites themselves are not being charged in the complaint).

121. *Carpenter*, 484 U.S. at 23.

122. SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709 (Apr. 12, 2017).

123. *See* Germaine, *supra* note 18 (showing that the SEC is set on pushing against any First Amendment claims and will pursue the termination of a "fake news" type of market manipulation).

124. *See* United States v. Downing, 297 F.3d 52, 57 (2d Cir. 2002) (showing that there was no need to find intent to defraud if defrauding and market corruption actually did occur).

125. *Id.* (focusing on the court's acceptance of the knowledge of the "essential nature" of the scheme to satisfy intent, rather than using scienter which is a very high level of intent that would need to be proven).

126. *Id.* at 55 (holding that James Downing, owner of the privately held corporation SearchHispanic.com, Inc. and several others, conspired to perpetrate a pump-and-dump scheme).

127. SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709 at *1 (Apr. 12, 2017).

hired.[128] Unlike *Downing*, the knowledge of the scheme relates directly to the First Amendment because hundreds of articles were posted contingent on these discussions.[129]

Like the court in *Carpenter*, the *Downing* court declined to rule on the First Amendment issues because in a classic pump-and-dump case, the broker usually calls the potential stockholder and this one-on-one conversation may manipulate the market, but it does not trigger First Amendment protections.[130] In *Lidingo Holdings*, the use of the Internet and the spreading of information through websites will make it harder for the court to ignore the First Amendment question.[131]

Depending on how the court interprets section 240.10b-5, Rule 10b-5 and section 17b, the writers hired by the holding company in *Lidingo Holdings* may also fall under the SEC's jurisdiction.[132] The scheme in *Lidingo Holdings* only worked if the holding company and the writers both understood what their role was in promoting the scheme.[133] Therefore, the court will have to interpret the provisions in the '33 and '34 Acts, respectively, to find the intent that links the holding company and the writers to the scheme.[134] By including section 17b of the '33 Act, however, which does not require scienter, the court in *Lidingo Holdings* may be able to avoid intent to establish that a fraudulent scheme took place.[135]

A more recent example of a pump-and-dump scheme with a similar fact pattern to *Downing* is *United States v. Gordon*.[136] Specifically, the U.S. Court of Appeals for the Tenth Circuit, in *Gordon*, looked to the variety of media used to disseminate falsified information as evidence of interstate

128. *See* Complaint, *supra* note 7, ¶ 11.

129. *See id.*; *see also Downing*, 297 F.3d at 56.

130. *See Downing*, 297 F.3d at 61 (showing that a phone call from a broker to a stockholder or an advertisement posted online by a broker could be a personal conversation and not actual speech).

131. *See* Complaint, *supra* note 7, ¶ 5 (showing the number of websites and the vast spread and reach the blog posts had on the Internet).

132. *See* 17 C.F.R. § 240.10b-5 (2018); *see also* 15 U.S.C § 77q(b) (2012).

133. *See* Complaint, *supra* note 7, ¶ 2 (describing the scheme as the writers using pseudonyms per the direction of the holding companies to then write stories that the holding companies asked them to write and post on various investment advisor websites).

134. 15 U.S.C. § 77q(a); 17 C.F.R. § 240.10b-5.

135. 15 U.S.C. § 77q(b) (requiring only using interstate commerce and directly or indirectly manipulating the market, even unknowingly doing so).

136. 710 F.3d 1124, 1130 (10th Cir. 2013) (showing how similarly the *Gordon* scheme involved fax blasts, e-mails, and brochures, but the Tenth Circuit again did not use a First Amendment lens for their decision and that the court left the means of manipulation out of the equation).

commerce.[137] Most importantly, the court in utilized section 17b to find that there was no disclosure of the promoter receiving payment for its advertisement, and no disclosure of the amount of the payment by the defendant.[138] In *Lidingo Holdings*, section 17b can be applied in a similar way because there was no disclosure that the writers were hired by the holding company to push falsified information with pseudonyms.[139] Lidingo Holdings' intent to defraud can be found through the email correspondence between the defendants, which discussed why they would not be disclosing names and payments, thereby violating section 17b.[140]

Though the *Lidingo Holdings* court will be able to use section 17b to find fraud, the defense counsel will still raise a free speech argument.[141] Similar to *Gordon*, the court in *Lidingo Holdings* will also have a harder time separating the speech from the manipulation itself. In *Lidingo Holdings*, Internet advisory websites were specifically used to reach a wider base and allegedly to create a large fraudulent scheme.[142] By utilizing the fast-paced qualities of Internet blog posts to disseminate information as quickly as possible, the scheme maximized the number of consumers and potential investors it reached.[143]

The Court in *Lowe* took a different approach than *Carpenter*, *Downing*, or *Gordon*.[144] In *Lowe*, the Court held that publishers could not be permanently enjoined from publishing non-personalized investment advice and commentary in securities newsletters because they were not SEC-registered investment advisors.[145] It is unclear whether the court in *Lidingo Holdings* will analyze the Investment Advisors Act of 1940, but the issue of whether

---

137. *Id.*

138. *See* 15 U.S.C. § 77q(b) (showing there is no need to prove intent to defraud with this section, just need to show that there was no disclosure).

139. *See* Complaint, *supra* note 7, ¶ 12.

140. *See id.*

141. *See generally* Germaine, *supra* note 18 (declaring that the SEC is aware that the defense counsel in all of these cases will be making a free speech argument).

142. *See* Complaint, *supra* note 7, ¶ 2 (asserting that the speech used by the holding company directly related to the speech being disseminated by the fake news writers).

143. *See id.*

144. *See* Lowe v. SEC, 472 U.S. 181, 211 (1985) (asserting how the court looked closely at the definition of an "investment advisor," rather than to the scheme itself, to analyze whether the actions taken were violating the Investment Advisors Act of 1940). *See generally Investment Advisers*, *supra* note 80 (defining what the regulation of investment advisors is and what the courts should see it as).

145. *Lowe*, 472 U.S. at 211; *see* 15 U.S.C. § 80b-2 (2012) (stating that the newsletters fell within the Investment Advisors Act's exclusion for the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation).

information being published can be seen as "non-personalized" investment advice and "commentary" will change the way the court decides *Lidingo Holdings*.[146] If the court sees the blog posts as "commentary" and not investment advice, there could be a strong argument for First Amendment protections for the writers.[147]

The Supreme Court discusses the First Amendment briefly in *Lowe*, namely to highlight why the petitioners were protected by the First Amendment and were not subject to the statutory definition of an investment advisor.[148] Whether market manipulation regulations supersede First Amendment protections is the main question in *Lidingo Holdings*.[149]

The Court in *Lowe* separated the holding company from the subsidiary and held that the writer was personally liable for the fraudulent speech.[150] That separation will not be as easy in a case like *Lidingo Holdings* because the holding company is intertwined with the subsidiary.[151] It will be difficult for the writers in *Lidingo Holdings* to argue that they merely provided First Amendment protected commentary on financial news since there are emails between the holding company and the writers outlining the scheme.[152]

Rather than looking to the strict definitions of the Investment Advisory Act of 1940, as the Court in *Lowe* did, the court in *Lidingo Holdings* has more information linking the holding company to the writers, making the court's analysis easier comparatively to *Lowe*.[153] The Court in *Lowe* did not

146. *See* 15 U.S.C. § 80b-2. *See generally*, SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709 at *2 (Apr. 12, 2017) (representing the issue of speech as investment advisory speech).

147. *See* Complaint, *supra* note 7, ¶ 10 (mentioning a possible defense as using the blog posts as opinionated "commentary" on investments rather than advisements); *see also Lowe*, 472 U.S. at 210 n.58, 211 (showing the *Lowe* decision may be outdated, but the veracity that the First Amendment is held to has not shifted; since the publishers are held as "bona fide publications" they are rightfully being protected by the First Amendment).

148. *See Lowe*, 472 U.S. at 211 (discussing that in *Lowe*, the petitioners could not be considered investment advisors because they fall within the Act's exclusions for bona fide publications).

149. *See id.* (showing that this decision from 1985 helps to frame how the First Amendment and market manipulation was seen by the courts before technological increases helped to worsen the problem).

150. *Id.*

151. *See* Complaint, *supra* note 7, ¶ 2 (describing how Lidingo Holdings, LLC, the stock promotion firm at the center of this issue, would hire writers as their subsidiaries to publish "ghost-written" pieces on advisory analysis on stocks).

152. *See id.* ¶ 38 (explaining the email conversations between the holding company and the writers).

153. *Lowe*, 472 U.S. at 211.

have the direct connection between the publisher and the writer.[154]

In *Agora*, a relatively similar case,[155] the court held that the SEC proved by clear and convincing evidence that defendants violated section 10(b)5, section 17b, and Rule 10b-5.[156] The court decided that the speech used was commercial speech, which is afforded less protection under the First Amendment.[157] In *Lidingo Holdings*, if the court finds the speech to be commercial speech, it will bar the defendant's First Amendment argument, and the court will be able to decide solely on the fraudulent scheme.[158]

Agora is similar to *Lowe* in that the publisher was separated from liability.[159] Applying a similar level of separation in *Lidingo Holdings* would either separate liability between Lidingo Holdings and the writers who wrote the blog posts, or separate Lidingo Holdings and the writers from the actual investment advisory websites.[160] If the court thus separates the holding company from its subsidiaries the probability that liability be imposed for one over the other is high.[161]

The court in *Lidingo Holdings* could attempt to mirror the *Agora* decision

---

154. *Id.* at 215.

155. No. MJG-03-1042 (D. Md. June 23, 2003) (explaining that the case involves the dissemination of falsified information and investment advisers/stock promoters failing to disclose pertinent information before disseminating it).

156. *See* 15 U.S.C. § 78j(b) (2012); *see also* 17 C.F.R. § 240.10b-5 (2018) (explaining why the SEC has not proven that Agora as a company, itself (separate from its subsidiary), violated the securities laws since per section 10b-5 Agora did not meet all of the requirements of the law (false statement, of material fact, with scienter, in connection with purchase or sales of securities, by using interstate commerce; though their subsidiary Stansberry did meet these requirements)).

157. *See Agora*, No. MJG-03-1042, at 8 (discussing how fake information was being spread through fake newsletters published by Agora or other Agora-owned subsidiaries; there was no disclosure that Agora was supporting the publishing, writing, and information being provided to help their own causes).

158. *See* Complaint, *supra* note 7, ¶ 2.

159. *Lowe*, 472 U.S. at 211; *see* Memorandum of Decision at 14-16, *Agora*, No. MJG-03-1042 (confirming that the *Agora* court is not accepting the SEC's argument to hold both Agora and its subsidiaries liable).

160. *See* Memorandum of Decision at 2, *Agora*, No. MJG-03-1042, ¶ 2 (noting that for the court in *Agora* the Defense Counsel's free speech argument did not hold weight); *see also Lowe*, 472 U.S. at 211 (upholding the defense counsel's free speech argument because the articles being written were considered "bona-fide" publications, not containing overt false or misleading information and they were publications of general and regular circulation).

161. Carpenter v. United States, 484 U.S. 19, 24 (1987); *Lowe*, 472 U.S. 181, 211; *Agora*, No. MJG-03-1042, ¶ 2 (showing that in each of these three cases the court decided to split the subsidiary from the main company to apply the statutes to them separately and find different levels of liability for them; usually shielding one from liability when one or more of the prongs in section 240.105b-5 were not met).

and separate the liability of the writers from the holding company.[162] But unlike the facts in *Agora*, the collusion between the holding company and the hired writers, in *Lidingo Holdings*, initiated the fraud.[163] Therefore, following *Agora*, and specifically splitting up the defendants, would not be helpful.[164] The alleged scheme in *Lidingo Holdings* relies on the closely intertwined relationship between the writers and the holding company that directly hired them.[165]

The First Amendment issues in *Lidingo Holdings* are vital to the market manipulation scheme, just as they were essential in *Agora*. In both cases, the speech can be categorized as commercial speech, which, as mentioned earlier, is not fully protected by the First Amendment.[166] The decision in *Lidingo Holdings* will be the first time a court can confront the First Amendment directly.[167] If the court uses a similar argument to *Agora,*[168] however, it can decide the case without directly addressing the First Amendment.[169]

The defense counsel's claims to free speech and the press in *Agora* touched on an inevitable expansion of SEC reign and control over speech.[170]

---

162. *See* Memorandum of Decision at 14, SEC v. Agora, Inc., No. MJG-03-1042, 2017 WL 23325429 (D. Md. June 23, 2003) (holding Agora distinct from its subsidiary Pirate separating liability between the corporation and its subsidiaries, editors, and writers).

163. *See* Complaint, *supra* note 7, ¶ 11.

164. *See* Motion to Dismiss ¶ 2, *Agora*, No. MJG-03-1042; *see also* Complaint, *supra* note 7, ¶ 2 (explaining how in Lidingo there was more of a connection between many of the writers and the holding company, though the holding company was the one who told the writers not to disclose their names or where they received their information or payment for the information, the writers perpetuated the scheme by agreeing to it).

165. *See* Complaint, *supra* note 7, ¶ 2 (showing against the SEC's overreach into an area that is protected by the First Amendment).

166. *See* Motion to Dismiss at 9, *Agora*, No. MJG-03-1042 (citing Ginsburg v. Agora, Inc., 915 F. Supp. 733, 739-40 (D. Md. 1995)) ("Indeed, *this* very Court has applied First Amendment privileges to *this* very Defendant, Agora, Inc.").

167. *See* Complaint, *supra* note 7, ¶ 12.

168. SEC v. Agora, Inc., No. MJG 03-1042, pt. II, § B, at 8 (D. Md. June 23, 2003) (noting that this case involves commercial speech).

169. *See id.* at 2 (holding that commercial speech is not as protected and, therefore, there should not be an issue of the First Amendment in this case).

170. *See* Motion to Dismiss at 25, SEC v. Agora, Inc., No. MJG-03-1042, 2017 WL 23325429 (D. Md. June 23, 2003) (stating that the SEC is attempting to expand its regulatory reach into an area where the protections of the First Amendment apply in full force).

170. Anthony Page, *Taking Stock of the First Amendment's Application to Securities Regulation,* 58 S.C. L. REV. 789, 790-91, 793, 799-800 (2007) (stating that financial market speech is usually held as commercial speech since the financial markets are affected by the commercial speech doctrine and that First Amendment protections to securities regulation is difficult due to the wide range of speech and persons involved).

The court in *Agora* did not agree with the defense counsel's argument that the investment advisors speech was opinion speech because financial market speech is normally viewed as commercial speech.[171] The court in *Lidingo Holdings* should not follow the *Agora* court in separating the holding company from the writers, but should follow the *Agora* court in holding that the writer's speech is commercial speech.[172] It will be easier for the court in *Lidingo Holdings* to find both the holding company and writers liable for fraud without focusing on free speech issues because speech involving the financial markets is nothing but commercial speech.[173]

B. Commercial Speech or Fully Protected Speech: Where Does "Fake News" Belong?

The Supreme Court has previously decided cases regarding the First Amendment when commercial speech is not at issue.[174] In *Alvarez*, the Court held that the Stolen Valor Act constituted a content-based restriction on free speech (i.e., opinion speech) in violation of the First Amendment.[175] A content-based restriction on free speech is rarely permissible.[176] The Court decided, pursuant to First Amendment jurisprudence, that the proscribed speech specifically did not fall into one of the enumerated categories of unprotected speech.[177] Conversely, the court in *Lidingo Holdings* will not see any restriction on the writers' speech as content-restrictive since they are using commercial speech to promote whether or not to do something in the

---

172. *See Agora*, No. MJG-03-1042, at 8 (noting that the case involved commercial speech, which is "afforded lesser [First Amendment] protection than other forms of expression").

173. *See* Page, *supra* note 171, at 790-91, 793, 799-800 (describing the difficulty in applying the First Amendment to speech used within the financial market since the Supreme Court has refused to decide on it and the definitions of the types of speech used within the financial market seems closer linked to commercial speech).

174. *See generally* United States v. Alvarez, 567 U.S. 709, 723 (2012) (noting that the Stolen Valor Act's proscription on speech impinges one's First Amendment rights).

175. *Id.* at 716-17 (stating that content-based restrictions directly violate the protections under the First Amendment since content-based restrictions are the most fundamentally adverse to the First Amendments protections).

176. *See id.* at 717 (explaining that content-based restrictions on speech are permissible to prevent incitement, obscenity, defamation, criminal conduct, "fighting words," child pornography, fraud, true threats, among few others).

177. *See id.* at 716 (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002)) ("As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. As a result, the Constitution demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality.").

financial market.[178] When fraud and the financial markets are involved, what speech is protected becomes less clear than what the Court identified in *Alvarez*.[179]

The speech in *Lidingo Holdings* will likely be deemed commercial speech as opposed to opinion speech, as described in *Alvarez*.[180] The speech disseminated in *Lidingo Holdings* is not opinion speech because the financial market is directly affected by the speech being used on the investment advisory websites that Lidingo holdings posted, whereas the speech used in *Alvarez* was not harmful to an entire sector of the business market.[181] The Court in *Alvarez* removed fraudulent speech from First Amendment protection, and as such, the court in *Lidingo Holdings*, confronted by fraudulent commercial speech, does not need to rule on any First Amendment issues.[182] Alhough the Stolen Valor Act presumably banned fraudulent speech, the Court narrowed the definition of fraudulent speech.[183] In deciding *Lidingo Holdings*, the court therefore will likely distinguish the speech therein from the speech in *Alvarez* because the former is commercial speech and the latter is opinion speech.[184]

On the other hand, the SEC, in *Lidingo Holdings*, could follow the FTC's decisions when dealing with deceptive practices involving speech.[185] The

178. *See* Complaint, *supra* note 7, ¶ 20 (explaining how Seeking Alpha, a site commonly used by Lidingo Holdings and other well-known investment advisors to post advisory blogs on, had changed their disclosure policy; but the commercial aspects of Seeking Alpha's business did not change, and most of the blogs posted on their site fall under a commercial speech definition rather than opinion speech).

179. *See Alvarez*, 567 U.S. at 723 ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations . . . it is well established that the Government may restrict speech without affronting the First Amendment.").

180. *See id.* at 716 (noting that the speech used by Alvarez was "pure speech" which is naturally protected by the First Amendment).

181. *See* Page, *supra* note 171, at 804 (explaining that the SEC considers any writing on the financial market, especially before a major prospectus as having the ability to condition the market and could therefore harm/affect the entire market).

182. *See Alvarez*, 567 U.S. at 716 (acknowledging that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

183. *See id.* at 723 (showing that the Court takes limitations on speech seriously because "free speech, thought, and discourse are to remain a foundation of our freedom").

184. *See id.* at 716 (noting that the speech in *Alvarez* constitutes "pure speech" which is fully protected under the First Amendment); *see also* Complaint, *supra* note 7, ¶ 26 (explaining how vast the speech being used by Lidingo Holding's writers spread and how they were published on serious investment websites with the ability to reach many investors and affect the market).

185. *See* FTC v. LeadClick Media, LLC, 838 F.3d 158, 169 (2d. Cir. 2016) (quoting FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 573 (7th Cir. 1989)) (stating that a defendant may be liable under the Federal Trade Commission Act "for deceptive practices that cause consumer harm if, with knowledge of the deceptive nature of the

court in *LeadClick Media* focused on commercial speech that promoted a fraudulent weight loss product and affected consumers.[186] The FTC avoids First Amendment defenses by directly regulating commercial speech because it is subject to less protections under the First Amendment.[187] If the court in *Lidingo Holdings* finds the speech at issue to be not only fraudulent, but also commercial in nature, First Amendment defenses would be inapplicable.[188] The court in *LeadClick Media* also ruled on the issue of "fake news" and "fake news sites."[189] The issue of fake news websites intertwining with speech in a financial marketplace that can affect consumers is an issue that the court in *Lidingo Holdings* will need to resolve.[190] The court in *LeadClick Media* acknowledged that hiring employees to knowingly push false information into the public sphere is detrimental to consumers; therefore, the court in *Lidingo Holdings* should come to the same conclusion after it determines that the speech is in fact commercial speech.[191]

Even if LeadClick Media, LLC did not intentionally deceive consumers, the court held that representations likely to mislead consumers must be subject to the same standard.[192] If the court in *Lidingo Holdings* takes a

---

scheme, he either 'participate[s] directly in the practices . . . or ha[s] authority to control them'"); *see also About the FTC: What We Do*, FTC, https://www.ftc.gov/about-ftc/what-we-do (last visited Jan. 19, 2018) (explaining that the FTC focuses on protecting consumers from deceptive promotions).

186. *See LeadClick Media*, 838 F.3d at 163 (discussing advertisements posted on websites run by LeadClick that were promoting weight loss supplements and claiming that they had superb effects that they did not actually have).

187. *Id.*

188. *Id.* at 164 (showing the knowledge requirement being met and the amount of business being affected by the fraudulent speech); SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709, at *1-2 (Apr. 12, 2017) (revealing similar facts to *LeadClick Media*, potentially leading to a similar outcome in *Lidingo Holdings*).

189. *See LeadClick Media*, 838 F.3d at 164 (noting that the type of false information at issue was not only harmful to the public, LeadClick Media, LLC knew the fraudulent nature of the information and still allowed for the advertisements to be posted on their site); *see also* Mannion, *supra* note 74 (showing that the SEC has no problem publicly calling the speech at issue here as fake news speech). *See generally* Germaine, *supra* note 18 (showing that the SEC is already calling the speech used in *Lidingo Holdings* as "fake news" speech).

190. *See Lidingo Holdings*, 2017 WL 2402709, at *1 (demonstrating that public companies, including Lidingo Holdings, LLC, were aware of falsified and bullish information posted on various news sites by people hired and instructed by said companies).

191. *See LeadClick Media*, 838 F.3d at 170 (noting that a defendant who implements a deceptive practice or has the ability to control those performing said practices "causes harm to consumers" in doing so).

192. *See id.* at 168 (quoting FTC v. Verity Int'l, Ltd., 443 F.3d 48, 63 (2d Cir. 2006)) ("FTC must show three elements: '[1] a representation, omission, or practice, that [2] is

similar stance to how the FTC has proceeded to argue similar cases, the issue of the First Amendment may be moot.[193] If *Lidingo Holdings* finds the speech being disseminated as harmful commercial speech then the SEC can follow the FTC's lead for enforcement actions where consumers are harmed by falsified speech.[194] If the court does not find the speech to be fraudulent and/or commercial in nature, the SEC will not likely prosecute.[195] Therefore, the court will have to focus on the '34 Act to find intentional fraud or the '33 Act to find a lack of disclosure.[196] By finding intentional fraud, and/or a lack of disclosure the court can decide in a similar fashion to the courts in *Gordon* and *Downing*, where the free speech arguments were moot after fraudulent behavior was found.[197]

IV. CONGRESS, THE SEC, AND WHISTLEBLOWERS . . . OH MY!

Without a change in the regulatory regime, dealing with fake news within the financial markets will only continue to increase.[198] Substantive changes need to be implemented regarding how the SEC brings enforcement actions against fake news.[199] Incentives need to be offered for people to come forward and report anything that seems unusual within their market news.[200] Until these two steps are taken, fraudulent schemes, like the one identified in *Lidingo Holdings*, will continue to occur with no precedent on how to

---

likely to mislead consumers acting reasonably under the circumstances, and [3], the representation, omission, or practice is material.'").

193. *See LeadClick Media*, 838 F.3d at 170 (asserting any use of commercial speech that has an effect on consumers and public markets can be censored and will not concern the First Amendment).

194. *LeadClick Media*, 838 F.3d at 169 (highlighting the three elements necessary to demonstrate deceptive acts or practices).

195. *Lidingo Holdings*, 2017 WL 2402709 (acknowledging that the SEC would be less likely to prosecute a case with clear First Amendment protections imbedded in the defendant's speech).

196. *Id.*; *see* 15 U.S.C. § 77q(a)-(b) (2012); 17 C.F.R. § 240.10b5 (2018).

197. United States v. Gordon, 710 F.3d 1124, 1142 (10th Cir. 2013) (explaining that in a pump-and-dump case, where some speech is used to initiate the scheme, it is not speech that is the crux of the issue so it does not need to be decided on); United States v. Downing, 297 F.3d 52, 58 (2d Cir. 2002) (holding that in a classic pump-and-dump case as this one, free speech arguments can be ignored because each prong in § 240.10b-5 is met and the First Amendment argument does not protect the scheme from that fact).

198. *See* Germaine, *supra* note 18.

199. *See* Michael S. Dicke, *SEC Crackdown on "Fake News" Is Itself Fake News (Perspective)*, FENWICK & WEST LLP (Apr. 21, 2017), https://www.fenwick.com/Publications/Pages/SEC-Crackdown-on-Fake-News-is-Itself-Fake-News.aspx (arguing that the SEC is not taking the correct steps in prosecuting this type of case).

200. *SEC Spotlight: Enforcement Cooperation Program*, SEC, https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml (last updated Sept. 20, 2016) [hereinafter *Whistleblower*].

prevent it.

Congress, with aid from the SEC, should update section 10(b) of the '34 Act and Rule 10b–5, to include specific language to prevent this type of blatant market manipulation.[201] Many courts deciding securities regulation and market manipulation cases have agreed that it is not the Judiciary's place to legislate[202] and, therefore, the SEC and Congress should begin to use the same form of action against fraudulent or misleading information that the FTC has been using.[203] The FTC has been able to successfully define terms in its statutes and show the effects of commercial speech on the health and welfare of people in society.[204] The SEC needs to show that this type of flagrant abuse of the statutes and dissemination of fake news will affect our markets in a way that will be difficult to overturn if not stopped now.[205] By clearly defining who an investment advisor is, what new forms of market manipulation look like, and what type of speech investment advisory speech falls under (commercial or opinion), the SEC would have an easier time bringing enforcement actions without having to address any First Amendment repercussions.[206] Congress needs to include in the updated regulations clearly defined terms to outline the serious harm the public may face without more protection from fake news.

Additionally, out of the five prongs that must be met for a violation of section 10(b) and Rule 10b-5, there should be a quasi-sixth prong added when applicable for fake news cases.[207] The prong would be, "and if there

201. 17 C.F.R. § 240.10b–5.

202. Evan Bernick, *Judicial Restraint Cannot Restrain the Administrative State*, HUFFINGTON POST, http://www.huffingtonpost.com/evan-bernick/judicial-restraint-cannot_b_9540812.html (last updated Mar. 25, 2017) (showing that courts who practice self-restraint and defer to Congress with respect to significant statutory decisions can be helpful or problematic depending on Constitutional interpretation).

203. *About the FTC*, FTC, https://www.ftc.gov/about-ftc (last visited Jan. 19, 2018).

204. *See* FTC v. LeadClick Media, LLC, 838 F.3d 158, 168 (2d. Cir. 2016) (noting that when defendants satisfy the applicable definitions prescribed by FTC statutes, they are subjected to liability for directly or indirectly disseminating falsified information).

205. Renae Merle, *Scheme Created Fake News Stories to Manipulate Stock Prices, SEC Alleges,* L.A. TIMES (July 5, 2017, 2:50 PM), http://www.latimes.com/business/la-fi-sec-fake-news-20170705-story.html (discussing why the SEC filed twenty-seven complaints on similar cases like Lidingo because of a "worrisome trend" taking over the financial markets and investment advisory field).

206. *See LeadClick Media*, 838 F.3d at 168 (exemplifying how clearly defined the FTC's statute is, and further, how a clearly defined statute can assist courts in drafting quicker, easier, and more understandable decisions).

207. *See* 17 C.F.R. § 240.10b–5 (2018) (stating that to establish a violation of section 10(b) and Rule 10b-5, the Commission must prove: 1) That the Defendants made a false statement or omission; 2) Of material fact; 3) With scienter; 4) In connection with the purchase or sale of securities; 5) By using a means or instrumentality of interstate commerce).

is a dissemination of incorrect, falsified, or fabricated information the defendant must disclaim on each site that they participated in spreading fake news." This would materialize in the form of a register for people who have injunctions on their records and cannot work in the financial markets industry anymore. Those subject to this register must also disclose their register status on the investment websites they are working for, as well to make the public aware of which rules they violated. This "prong" must be met after the first five are clearly satisfied and the defendant is found liable.[208]

To further crack down on the increasing dissemination of fake news, there should be a program where the private sector works together with the public sector. The SEC currently has a program called "SEC Spotlight: Enforcement Cooperation Program," which attempts to create a link between the private and public community and allows businesses to self-report their wrongdoing to potentially avoid enforcement action or receive a lesser penalty.[209] Since this is most likely the case, the SEC can expand their new whistleblower program that was created under Dodd-Frank.[210]

These three recommendations will increase severe measures against people participating in a fake news type of market manipulation. Amending the securities statutes used in these cases to be more closely aligned with the FTC, increasing the shame that comes after being found liable, and by promoting a stronger whistleblower program, fake news schemers will be less successful in manipulating markets and defrauding consumers.[211]

V. CONCLUSION

Although the idea of "fake news" affecting the financial markets is relatively new because of technological advances, false dissemination of information affecting the financial markets is a traditional tool for market manipulation.[212]

---

208. *See generally id.* (showing the four prongs that must be met now in a "false and misleading" action taken by the SEC; the fifth prong is my own idea to add to this statute).

209. *See* Whistleblower, *supra* note 200 (outlining how the program works, who needs to be contacted, and what the steps would be).

210. *Office of the Whistleblower*, SEC, https://www.sec.gov/whistleblower (last updated Jan. 17, 2018).

211. Jason Zuckerman and Matt Stock, *One Billion Reasons Why the SEC Whistleblower-Reward Program Is Effective*, FORBES (July 18, 2017, 4:46 PM), https://www.forbes.com/sites/realspin/2017/07/18/one-billion-reasons-why-the-sec-whistleblower-reward-program-is-effective/#1559a9cb3009 (showing how effective the SEC whistleblower program has been thus far, and their ability to recover nearly one billion dollars in financial penalties from wrongdoers).

212. *See* Kiernan, *supra* note 16.

Filing twenty-seven complaints against holding companies establishes the SEC's will to combat this "fake news" market manipulation.[213]

By using the historical precedence in insider trading cases, pump-and-dump cases, stock promotion cases, and First Amendment within the business lens cases, the court in *Lidingo Holdings* will decide that there is enough evidence to find fraud under section 240.10b-5, Rule 10b-5, and section 17b and that the speech used within the scheme was commercial speech. By following how the FTC brings enforcement actions and amending the `33 Act and the `34 Act to clearly define more terms the SEC may be able to avoid more First Amendment issues with further fake news cases. Also by expanding their whistleblower program and working closely with the private sector the SEC may avoid these major enforcement actions all together. Fake news is not going away, it is time that the SEC take proactive steps to stop this form of market manipulation before it evolves.

213. *See* Complaint, *supra* note 7, ¶ 2.

* * *